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CLASS ACTIONS

BY WILLIAM E. KELLY AND TIMOTHY C. KLENK*

IN THE PAST few years, the availability of class actions under rule 23 of the Federal Rules of Civil Procedure has probably had a greater effect on the administration of civil justice in the federal court system than any other procedural device. The growing number of cases filed as class actions has added a tremendous burden to the already over-worked district and appellate courts, but has also resulted in the vindication of the rights of many small claimants who, absent rule 23, would have been unable to obtain relief. The United States Court of Appeals for the Seventh Circuit has been a leader in the development of the law in this area.

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1. Rule 23(a) provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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The work of the Court of Appeals for the Seventh Circuit in the class action area during its 1973-1974 term has perhaps been overshadowed by several important class action decisions handed down by the United States Supreme Court during the same period. However, the Seventh Circuit decisions during this term will have a substantial impact on class action procedures in this circuit and in others and their importance can hardly be overemphasized. Among the important areas of the law relating to class actions discussed in these cases are: 1) the jurisdiction of federal courts in class actions; 2) notice to class members; 3) the prerequisites for maintaining class actions; 4) discovery against class members; and 5) the appealability of the allowance or denial of class action status. The effect of the recent decisions of the Seventh Circuit on these areas of class action law will be discussed in this article.

JURISDICTION OF FEDERAL COURTS IN CLASS ACTIONS

A question which has repeatedly been presented in class action cases is whether the federal courts have jurisdiction over the claims of class members in cases where those class members could not have individually asserted their claims because of a lack of federal court jurisdiction. This question was presented to the Supreme Court of the United States in the well-known case of *Supreme Tribe of Ben-Hur v. Cauble*. In that case the Court held that a group of Indiana citizens were bound by an earlier decree in a case in which they were members of the plaintiff class—despite the fact that the court’s jurisdiction in that case was based on diversity of citizenship and the defendant was an Indiana citizen. In *Snyder v. Harris* the Court decided that a class action in a diversity case could not be maintained by a named plaintiff who alleged damages of less than $10,000, even though the aggregate amount of the claims of the plaintiff and other class members far exceeded that jurisdictional amount. However, the Court did not decide whether a plaintiff who had a claim of $10,000 or more could bring an action on behalf of class members whose individual claims did not meet that jurisdictional amount. This question was decided by the Court in December of 1973 in *Zahn v. International Paper Co.*

4. *Id.* at 365-66.
Court, concluding that *Snyder v. Harris* demanded the application of "the rule governing named plaintiffs joining in an action to the unnamed members of a class," held that the claims of the class members could not be aggregated to establish the $10,000 amount in controversy, but that each class member had to be able to establish federal court jurisdiction over his own claim. As stated by the Court, "one plaintiff may not ride on another's coattails."

The question of the jurisdiction of federal courts in class actions came before the Court of Appeals for the Seventh Circuit during its most recent term in a unique way. In *Appleton Electric Co. v. Advance-United Expressways*, the plaintiff, on behalf of a class of shippers, brought an action against defendant, as representative of a class of trucking companies, for the refund of excessive rates which the defendants had charged to them. Counsel for the defendant class objected to the inclusion in the class of any defendants who had no "minimal contacts" with the northern district of Illinois, arguing that the court had neither jurisdiction over them nor venue over the claims against them. In rejecting this argument, the court noted that section 16(4) of the Interstate Commerce Act specifically provides that suits under section 16 of the Interstate Commerce Act, under which the shippers were suing, may be maintained against joint defendants in any district in which any one of said joint defendants could have been sued.

In light of the Supreme Court's decision in *Zahn*, treating absent class members the same as named plaintiffs for jurisdictional purposes, the court was probably fully justified in applying section 16(4) of the Interstate Commerce Act in the class action before it. Furthermore, although the court in *Appleton Electric* did not specifically deal with the question of the constitutionality of section 16(4), there is probably little question that it at least marginally comes within due process stand-

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7. 94 S. Ct. at 512, n.9.
8. *Id.* at 512. The Court's conclusion that unnamed class members must be treated the same as named plaintiffs is not only consistent with *Snyder v. Harris*, but would seem necessary in view of rule 82 of the Federal Rules of Civil Procedure, which provides that those rules "shall not be construed to extend or limit the jurisdiction of the United States District Courts . . . ." However, as pointed out by the dissenting Justices in *Zahn*, the decision appears to be inconsistent with the Court's decision in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). Unfortunately, the majority opinion does not even mention the *Supreme Tribe of Ben-Hur* case, no less distinguish or overrule it.
9. 494 F.2d 126 (7th Cir. 1974).
11. 494 F.2d at 139.
ards. As stated by the Supreme Court in *Robertson v. Labor Board*,\(^\text{12}\) "Congress clearly has the power to authorize a suit under federal law to be brought in any inferior federal court. Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States."\(^\text{13}\)

Unfortunately, rather than limiting its decision to the facts in the case before it, the court of appeals went on to state: "Even if this were not a suit under section 16 of the Interstate Commerce Act, Rule 23 must be interpreted to allow inclusion of all class members, whatever their connection with the forum."\(^\text{14}\)

In reaching this conclusion, the court quoted from *Research Corp. v. Pfister Associated Growers, Inc.*,\(^\text{15}\) in which the district court held that an action could be maintained against absent members of a defendant class, even though the court lacked venue with respect to the claims against them. In support of its determination, the court asserted that defendant class actions would virtually be eliminated if courts apply the same venue requirements to absent members of defendant classes as are applied to named defendants. It said:

> The Supreme Court has ruled, albeit not in a class action situation, that the patent venue statute is exclusive and must be satisfied as to all defendants. . . . The Supreme Court has also ruled that with regard to the aggregation of separate claims in a class action under Rule 23, Rule 82 forbids the expansion of the term 'matter in controversy' to allow the aggregation of the claims in such suits to reach the jurisdictional amount. . . . The defendants argue that since Rule 82 also says that the federal rules 'shall not be construed to extend or limit' the venue of actions, as well as jurisdiction, the valid venue objections of the nonparty class members should also be sustained. However, this court concludes that venue need not be established as to those non-representative-party class members, since to do so would eliminate the use of the class action route in all cases where a defendant class is appropriate.\(^\text{16}\)

It appears that the district court decision in the *Research Corp.* case was not justified and thus the Seventh Circuit's reliance on that decision in *Appleton Electric* was unwarranted. Despite the understandable desire of the district court in *Research Corp.* to make defendant class actions as effective as possible, and to effectuate the purpose of rule 23 in this regard, it had no power to interpret rule 23 in any

\(^{12}\) 268 U.S. 619 (1925).
\(^{13}\) *Id.* at 622.
\(^{14}\) 494 F.2d at 140.
\(^{15}\) 301 F. Supp. 497 (N.D. Ill. 1969).
\(^{16}\) *Id.* at 501 (citations omitted).
way which would extend the court's jurisdiction or venue. Not only is it prevented from doing so by rule 82, which precludes the construction of the Federal Rules of Civil Procedure in any way which would "extend or limit the jurisdiction of the United States district courts or the venue of actions therein," but it is precluded from doing so because any interpretation of the rules of procedure in a way which would give the district courts jurisdiction or venue over defendants in a class action which it would not have had if those defendants were named defendants in the action would violate the separation of powers concept contemplated by the enabling Act pursuant to which the Rules of Civil Procedure were promulgated. 17 This is especially true in light of the Supreme Court's recent decision in Zahn v. International Paper Co. 18 indicating that, at least for jurisdictional purposes, class members must be treated the same as named parties. 19

The Seventh Circuit in Appleton Electric, again citing the Research Corp. case, also states that, the right of defendant class members to exclude themselves from the defendant class "is adequate protection for whatever due process rights are not satisfied by actual notice and representation by the unnamed defendants." 20 However, the court's statement is made with respect to its discussion of the adequacy of representation question and should not be construed to apply to questions of jurisdiction or venue. Certainly, a court which lacks jurisdiction over the person of certain defendants cannot obtain such jurisdiction by affording those defendants the opportunity to remove them-

17. The Enabling Act, pursuant to which Congress gave the Supreme Court the authority to promulgate rules of procedure, requires that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1970). In promulgating the rules, the Court specifically provided in rule 82 that the rules should not be construed to effect jurisdiction or venue. The jurisdiction and venue of federal courts is, of course, controlled by article III of the Constitution and by statute. See, e.g., 28 U.S.C. § 1251 (1970), et seq.


19. See discussion following note 5, supra. One interesting aspect of the Zahn decision is that the majority consistently refers to class members as plaintiffs, whereas, the dissenting justices just as consistently refer to them as "nonappearing members of the class." See also American Pipe & Construction Co. v. State of Utah, 94 S. Ct. 756 (1974), in which the Court held that the statute of limitations with respect to the claims of the class members was tolled between the date on which the class action complaint was filed and the date on which the district court found that the case could not properly be maintained as a class action. The Court said:

Under the circumstances of the case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class,' Rule 23(a)(3), (4), the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Id. at 768 (emphasis added).

20. 494 F.2d at 140,
selves from the case. Although a named defendant can waive in personam jurisdiction by appearing in an action, his failure to opt out can hardly be equated to making such an appearance.

NOTICE

After disposing of the jurisdictional question in Appleton Electric, the court noted that each member of the defendant class would receive notice of the suit by certified mail. It then concluded that "the only possible constitutional infirmity is inadequate representation." With respect to the question of adequacy of representation, the court found that the only conflict between the interests of the named defendant and the other class members would be in apportioning the refunds they would have to pay to the plaintiffs. The court then observed that any class member who felt it would not be adequately represented by the named defendant could opt out, and held that "the opportunity for exclusion is adequate protection for whatever due process rights are not satisfied by actual notice and representation by the named defendant or by counsel for unnamed defendants."

One month before the Court of Appeals for the Seventh Circuit handed down its decision in Appleton Electric, it decided another case involving the question of notice to the class and the right of class members to opt out after receiving such notice if they did not believe that they were adequately represented. In that case, Air Line Stewards & Stewardesses Association v. American Airlines, a union which represented airline stewardesses, and twelve stewardesses who lost their jobs after becoming pregnant, sued on behalf of a class of all stewardesses employed by American Airlines "who had been, desired to be, or would in the future desire to be, pregnant." The suit challenged American's policy of terminating pregnant stewardesses as being discriminatory against women, and thus violating the Civil Rights Act of 1964. Shortly after the union and the stewardesses filed their class action complaint, the union and American Airlines entered into a collective bargaining agreement whereby the challenged practice was

21. Id.
22. Id.
23. Id.
24. 490 F.2d 636 (7th Cir. 1973).
25. Id. at 637-38. The appeal in this case was consolidated with the appeal in Airline Stewards and Stewardesses Association v. Transworld Airlines, Inc., a case against TWA involving the same issues. For simplicity's sake, the discussion herein will be limited to the case against American Airlines.
terminated prospectively. The union and American then negotiated a settlement of the class action. Under the terms of the settlement, stewardesses who had been discharged because of their pregnancy would be rehired as vacancies occurred, but they would not be entitled to back pay.

The district court gave notice of the settlement to the class of terminated stewardesses. Several of the class members registered their opposition to it and sought to remove themselves from the class. The district court held that the action was a rule 23(b)(2) class action and that class members were thus not entitled to exclude themselves. Therefore, it entered judgment approving the settlement and ordering it implemented. Several of the objecting class members appealed.

On appeal, the court of appeals concluded that, because of the collective bargaining agreement reached by the union and American, there was no longer any need for the prospective relief sought on behalf of stewardesses who had not yet been terminated. The only class needing relief after that agreement was reached was the class of former stewardesses whose employment had been terminated because of their pregnancy. As to that class, the court held, the action must be maintained as a 23(b)(3) class action, notice of the action must be given to all class members, and each must be given the opportunity to opt out of the class. "Unless a class action is maintained under rule 23(b)(3)," the court concluded "no right to opt out exists."27

The court's determination in Appleton Electric, that the right to opt out of a class provides adequate protection for whatever due process rights are not satisfied by actual notice and representation by the named defendant or by counsel for the unnamed defendants, and its conclusion in the Airline Stewards & Stewardesses case that the right to opt out exists only in rule 23(b)(3) class actions, raises the question of whether due process requires notice to class members in rule 23(b)(1) and (2) class actions. Without such notice, class members would not only be unable to exclude themselves from the class, but would be unable to intervene, to have counsel of their own choice appear on their behalf, or to challenge the adequacy of their representation.

In Eisen v. Carlisle & Jacquelin,28 the Court of Appeals for the Second Circuit, stated that "notice is required as a matter of due process in all representative class actions, and [rule] 23(c)(2) merely re-

27. 490 F.2d at 642.
28. 391 F.2d 555 (2d Cir. 1969) [hereinafter referred to as Eisen II].
quires a particularized form of notice in [rule] 23(b)(3) actions.”

In Schrader v. Selective Service System, the Court of Appeals for the Seventh Circuit adopted the Second Circuit’s conclusion, holding: “we are of the opinion that the Eisen . . . decision is the correct interpretation of Rule 23(b)(1) and (2). The more recent District Court opinions agree that pre-judgment notice is required in all representative actions.” Thus, the court in Schrader held that the district court in a previous class action, in which Schrader was a class member, “had erred in not requiring notice to be given in some manner to absent class members,” and that that case “was not a valid class action and was not binding upon anyone except the named plaintiffs to that action.”

The question of whether due process requires notice above and beyond the explicit directives of rule 23 has yet to be decided by the Supreme Court, and the circuits are almost evenly divided on the question. The issue was presented to the Supreme Court in the recent

29. Id. at 564.
30. 470 F.2d 73 (7th Cir. 1972).
31. Id., citing Pasquier v. Tarr, 318 F. Supp. 1350, 1353 (E.D. La. 1970), aff’d 441 F.2d 116 (5th Cir. 1971) and Zachary v. Chase Manhattan Bank, N.A., 52 F.R.D. 532 (S.D.N.Y. 1971). Although the Court of Appeals for the Seventh Circuit referred to the conclusion reached by the Second Circuit in Eisen II as holding, it is at least arguable that it was only dictum, because Eisen II involved a rule 23(b)(3) class action, for which notice is, in any event, required by rule 23(c)(2).
32. 470 F.2d at 75. The court of appeals did not discuss its reason for holding that the defendant was not bound by the previous decision because the plaintiff had not received notice. Presumably, it based its conclusion in this regard on a mutuality of estoppel theory. The context in which the question of the res judicata effect of a proceeding in which there was some constitutional deficiency will probably arise most often where a plaintiff seeks to maintain an action, the defendant asserts that the plaintiff is bound by the judgment in a former action in which the plaintiff was a class member, and the plaintiff collaterally attacks the former judgment because of some procedural deficiency in it. See, e.g., Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), in which the court held a plaintiff not bound by the judgment in a former class action because the plaintiff did not adequately represent the class. See also, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), in which the plaintiff in a subsequent action unsuccessfully argued that the court in the original class action lacked jurisdiction over certain class members.
33. A. Notice is required in all class actions:
appeal from the Second Circuit's decisions in Eisen but the Court noted that the case before it was a (b)(3) class action and that rule 23(c)(2) expressly required that notice be given in such actions. Thus, it declined to rule on the broader due process question.

In reaching the conclusion that notice to the class was required in all class actions, the Eisen II court relied on Mullane v. Central Hanover Bank & Trust Co. However, this reliance may have been misplaced since Mullane was not a representative action, but a suit to settle a common trust fund where a large number of beneficiaries were interested parties. Thus, the court was not concerned with questions of notice where an adequate representative of the class was present, but with what type of notice was required to preserve the parties' due process rights.

Although the Supreme Court in Eisen IV claimed to be "concerned . . . only with the notice requirements of subdivision (c)(2), which are applicable to class actions maintained under subdivision (b)(3)," it also cited the Mullane case in a way which lends support to those arguing that due process requires notice to the class in all class actions. The Court in Eisen IV said:

In Mullane the Court addressed the constitutional sufficiency of publication notice rather than mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement of accounts. The Court observed that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. It further stated that notice must be 'reasonably calculated, under all the circumstances, to apprise

B. Notice is not required by due process in every class action:

35. Id.
38. 94 S. Ct. at 2152 n.14.
interested parties of the pendency of the action and afford them an opportunity to present their objections.\textsuperscript{39}

Although the language cited by the Court from \textit{Mullane} is broad, it must be read in the context of the Court's refusal to decide whether due process requires notice in (b)(1) and (b)(2) class actions. It must also be remembered that the language is cited by the Court in support of its holding that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort,"\textsuperscript{40} and thus deals with the question of the type of notice which must be given where notice is required, rather than with the question of whether such notice is required in cases where the absent class member is adequately represented.\textsuperscript{41}

The reliance on adequate representation to satisfy the dictates of due process finds some support in two older Supreme Court cases. In \textit{Supreme Tribe of Ben-Hur v. Cauble},\textsuperscript{42} a diversity case decided under former Supreme Court Rule 38, the Court held that a class decree was res judicata as to all members of the class despite the fact that some of them resided in the same state as the defendant. The court based its holding on the fact that the claims of the absent members had been fully and adequately represented and made no mention of any notice requirement.

Similarly in the later case of \textit{Hansberry v. Lee},\textsuperscript{43} the Supreme Court considered the question of whether a prior suit designated as a class action was \textit{res judicata} as to the claims of absent class members. Again the Court made no mention of any notice requirement. The Court instead focused on the issue of adequacy of representation, stating that members of a class, though not present, may be bound by the judgment where they are adequately represented by parties who are present.\textsuperscript{44}

\begin{itemize}
  \item \textsuperscript{39} Id. at 2151 (emphasis added).
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Even \textit{Mullane}, which was not a representative action, recognizes that, under some circumstances, persons who cannot be given notice can fairly be bound by the determination reached in a suit in which their interests are adequately represented. In discussing the type of notice to the trust beneficiaries which would be adequate to assure due process in that case, the Court observed:
  \begin{quote}
  This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore, notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all.
  \end{quote}
  \item \textsuperscript{42} 255 U.S. 356 (1921).
  \item \textsuperscript{43} 311 U.S. 32 (1940).
  \item \textsuperscript{44} Id. at 42-43.
\end{itemize}
Due process requirements are met unless "it cannot be said that the procedure adopted fairly insures the protection of absent parties who are bound by it."\(^4\)

In order to determine whether adequate representation alone, without notice, is sufficient to "fairly insure the protection of the interests of absent parties" who might be bound by the judgment in a class action, it is helpful to analyze the function that notice would serve in the different types of class actions permitted by rule 23.

In actions under rule 23(b)(1),\(^4\) it is apparent that whatever relief is granted will affect all class members in the same way, and that the only individual issues would relate to the specific amount of money or property, if any is involved, to which each member would be entitled. In this type of case, there is only one possible class solution to the dispute, so it would make no sense to allow class members to opt out. Furthermore, if representation is indeed adequate, the position of all class members would be presented, since their claims or defenses are identical to those of the class representative. The only benefit of prejudgment notice would be to give class members the opportunity to make a personal judgment as to the adequacy of representation and intervene if they so desire.

Actions filed under rule 23(b)(2)\(^4\) also involve situations where class members stand in identical positions with respect to the opposing

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45. *Id.* at 42.
46. Rule 23(b)(1) provides that class actions can be maintained where the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Examples of such actions given by the Advisory Committee include, under (A), litigation to declare a bond issue invalid, to compel or invalidate an assessment, or to determine rights or duties of riparian owners. *Advisory Committee Notes, 39 F.R.D. 69, 100 (1966).* Under (B), the examples given include an action to prevent financial reorganization of a fraternal benefit association, an action by shareholders to compel the declaration of dividends, or a claim against a fund insufficient to satisfy all claims. *Id.* at 100-02 (1966).

47. Rule 23(b)(2) provides that class actions can be maintained where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Examples of (b)(2) actions listed in the Advisory Committee Notes include civil rights actions alleging class-wide discrimination and suits by a group of purchasers against a seller to enjoin illegal price discrimination. *Advisory Committee Notes, 39 F.R.D. 69, 102 (1966).*
party and where the relief granted would affect the class in an identical manner. In such cases, it makes little sense to allow a class member to opt out, since, as a practical matter, the decree will be dispositive of the claims of the class in any event. Although rule 23(b)(2) can be applied only in cases where "injunctive relief or corresponding declaratory relief" is requested, it has been applied in cases where a claim for such relief is accompanied by an "ancillary" claim for damages. In addition, some (b)(2) classes might include sub-classes which could be entitled to relief which is different than that sought by other class members. In such cases, due process may require not only that each sub-class be adequately represented, but that each class member be given notice of the action and the opportunity to withdraw.

One answer to this problem lies not so much in providing individual notice in all (b)(2) actions, but in correctly identifying the type of class which is involved. The Seventh Circuit, in *Air Line Stewards & Stewardesses Association v. American Airlines, Inc.*, made the distinction between (b)(2) and (b)(3) actions clear in a case in which the class (which had been held by the district court to be a (b)(2) class) included both discharged and currently employed stewardesses. As to the sub-class of currently employed stewardesses, the court noted that the only relief they sought from American's practice of discharging pregnant stewardesses was prospective. Thus, a (b)(2) class was appropriate as to them. But, as to those stewardesses who had already been discharged because of American's discriminatory policy, the court of appeals found the district court's (b)(2) class designation erroneous. Because the right to reinstatement and/or back pay of each of the discharged stewardesses depended on facts peculiar to each individual, a (b)(3) action was found to be the only appropriate one with


49. See, e.g., *Air Line Stewards and Stewardesses Association v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), where the plaintiff class included both discharged stewardesses, who were interested in re-instatement and back pay, and stewardesses who were still employed, who were interested only in prospective relief.

50. *Id.*

51. *Id.* at 643. However, the claims of this (b)(2) class were moot, because the stewardesses and the airline had entered a collective bargaining agreement in which the stewardesses received the relief they sought.
Reclassification of an action is not the only alternative to an across-the-board due process requirement of giving notice in all class actions. A number of courts have recognized, and indeed rule 23 itself provides, that notice may be given in any class action where it is necessary for "the fair conduct of the action." In fact, even in the Second Circuit, at least one district court has interpreted the language of Eisen II in a more restricted manner than did the Seventh Circuit in Schrader. In Lynch v. Household Finance Corp., the plaintiff class sought declaratory and injunctive relief against Connecticut's garnishment law. The court found that this was a proper class action under rule 23(b)(2) and that no notice to class members was required by due process since the plaintiffs were adequately represented, no monetary relief was requested and no factual issues were presented. The court noted the Eisen II dicta, but concluded: "[W]e read Eisen simply to say that notice is required in all class actions when due process so requires." Under rule 23(d)(2), district courts have the discretion to order notice in any class action. In exercising this discretion, the district courts should take into consideration the common or individual nature of the claims or defenses of the class members and the ability of the class representative to represent the class members with respect to those claims or defenses. Although this more flexible approach would lack the degree of certainty afforded by the Schrader decision, it would seem to offer protection to absent class members while still preserving the utility of the class action device.

PREREQUISITES

Subsection (a) of rule 23 sets forth several requirements, all of which must be met by a party seeking to maintain a class action in federal court. Subsection (b) describes three types of class actions and sets forth the requirements which must be met by a party seeking to maintain a class action under each. The most frequent question pre-
sent to the federal courts dealing with class actions is whether these requirements (or "prerequisites") have been met. Although "Rule 23 obviously vests the trial judge with wide discretion in his application of [these prerequisites]," questions involving their application are often presented on appeal. Several of the cases decided by the Court of Appeals for the Seventh Circuit during the past year deal with the prerequisites established by rule 23(a) and (b) for maintaining class actions. Two of the prerequisites for class actions which have been litigated in the Seventh Circuit are the "adequacy of representation" and "manageability" requirements.

**Adequacy of Representation**

One of the most important prerequisites for maintaining a class action under rule 23 is that the representative party fairly and adequately represent the interests of the absent class members. The importance of this issue stems from the fact that adequacy of representation is mandated not only by rule 23, but by the due process clause of the Constitution. One criteria which has been repeatedly applied by the courts in determining adequacy of representation is whether the interests of the representative party are co-extensive with the interests of the class, or whether those interests conflict with the interests of the absent class members. Another criteria, which is closely related to the first, is whether the representative party is a member of the class he purports to represent.

The first of these two criteria was considered by the Seventh Circuit in the previously discussed case of *Air Line Stewards & Stewardesses Association v. American Airlines*. In that case, a union which was authorized to represent the stewardesses in their collective bargaining with the airline with respect to the terms of the employment, sought to represent both present and terminated stewardesses in the class action. The court held that the union's "adequacy as a representative

58. Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126, 139 (7th Cir. 1974).
59. Rule 23(a)(4).
60. Rule 23(b)(3)(D).
62. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 24 (2d Cir. 1971).
64. 490 F.2d 636 (7th Cir. 1973).
party in a class suit, and its authority to compromise the rights of its members in a class suit when such rights do not arise out of collective bargaining agreements are to be tested and judged in the ordinary way.\textsuperscript{65} Applying these "ordinary" criteria, the court found that the union was not an adequate representative of the class and, in fact, had interests antagonistic to those of the class.\textsuperscript{68} Of particular concern to the court was the fact that the union's interest in protecting the jobs of recently employed stewardesses conflicted with the interest of terminated stewardesses who, if reinstated, might replace them.\textsuperscript{67}

Of utmost importance in determining whether a representative party has interests which coincide with those of the absent class members, and will thus adequately represent the class, is the question of whether the representative possesses the same claims or defenses as the class he purports to represent. As stated by the Court of Appeals for the Seventh Circuit in Mintz v. Mathers Fund, Inc.:\textsuperscript{68}

A plaintiff who is unable to secure standing for himself is certainly not in a position to 'fairly insure the adequate representation' of those alleged to be similarly situated. In short, a predicate to a party's right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class.\textsuperscript{69}

The requirement that the plaintiff have the same claim or defense as the other class members is required not only by the adequacy of representation requirement of rule 23(a)(4), but by the case or controversy requirement of article III of the Constitution,\textsuperscript{70} by the language of rule 23(a) that "one or more members of a class may sue or be sued as representative parties,"\textsuperscript{71} and by the requirement that the claims

\textsuperscript{65} Id. at 642, citing Cook County College Teachers Union v. Byrd, 456 F.2d 882, 885 (7th Cir. 1972), and other cases.

\textsuperscript{66} 490 F.2d at 640.

\textsuperscript{67} Id. at 639-40.

\textsuperscript{68} 463 F.2d 495 (7th Cir. 1972).

\textsuperscript{69} Id. at 499. See also LaMar v. H & B Novelty Co., 489 F.2d 461 (9th Cir. 1973); and Seligson v. Plum Tree, Inc., 55 F.R.D. 259, 261 (E.D. Pa. 1972).

\textsuperscript{70} In O'Shea v. Littleton, 94 S. Ct. 669 (1974), the Court was faced with the question of whether certain citizens of Cairo, Illinois, could assert a claim against a county judge and magistrate based on their alleged discrimination in setting bail for, and sentencing, criminal defendants. The Court said: "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." Id. at 677. See also Watkins v. Chicago Housing Authority, 406 F.2d 1234, 1236-37 (7th Cir. 1969).

\textsuperscript{71} Rule 23(a) (emphasis added). See Seligson v. Plum Tree, Inc., 55 F.R.D. 259, 261 (E.D. Pa. 1972) in which the court said:

Certainly membership in the class by a party who seeks to represent it is a fundamental prerequisite to a class action. Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962). To be a member of a class,
of the representative party be typical of those of the class.\textsuperscript{72}

In the \textit{Airline Stewards & Stewardesses Association} case, the Seventh Circuit concluded that the union could not "be treated as the equivalent of a group of former stewardesses terminated on account of pregnancy, and thus members of and adequate representative of, the class." Therefore, the leaders of the union "are not members of the class as now defined, and they have antagonistic interests."\textsuperscript{73}

One problem raised by the rule that a class representative must be a member of the class he purports to represent is when and how the determination of whether he has the same claim or defense as the absent class members should be made. This question is especially difficult when the determination depends on contested issues of fact or law.

In \textit{Eisen IV},\textsuperscript{74} one of the issues presented to the Supreme Court was whether it had been proper for the district court to conduct a "mini-hearing" on the merits of the plaintiff's claim for the purpose of determining whether the plaintiff or defendant would have to pay for notice to the class. In holding that such a hearing was improper, the Court said:

\begin{quote}
We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.\textsuperscript{75}
\end{quote}

The difficulty with the Supreme Court's position in \textit{Eisen IV} is that it ignores the fact that the answer to the question of whether the requirements of rule 23 are met often depends on whether the plaintiff has stated a cause of action and can prevail on it, or whether his claim might be barred by some defense which does not relate to the class as a whole. One way in which this difficulty can be avoided is suggested by the Seventh Circuit in \textit{Koos v. First Nat'l Bank of Peoria.}\textsuperscript{76}

\begin{footnotes}
\item[72] a party must have rights in the cause of action asserted on behalf of the class, \textit{i.e.}, he must have suffered or be threatened with the same injury alleged on behalf of the class. \textit{See Greenstein v. Paul}, 275 F. Supp. 604 (S.D.N.Y. 1967), \textit{aff'd}, 400 F.2d 58 (2d Cir. 1968).
\item[73] Rule 23(a)(3).
\item[74] Air Line Stewards & Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636, 640 (7th Cir. 1973).
\item[76] Id. at 2152.
\end{footnotes}
In *Koos*, the plaintiff filed an action on his own behalf and on behalf of other borrowers from the defendant bank alleging that the defendant was charging them in excess of the 8 per cent rate of interest allowed by the Illinois Usury Law. The plaintiff claimed that the defendants' use of a 360-day year to calculate interest caused the annual rate to exceed eight per cent. The statute under which the plaintiff sued specifically exempted from the eight per cent maximum interest rate loans secured by certain securities, including stock certificates and certificates of deposit. The loan which had been made to the plaintiff by the defendant bank had been secured by the pledge of four savings and loan certificates for the withdrawal of capital accounts and by the assignment of a cash value of two life insurance policies. The district court held that the statute was "designed to protect only relatively small, personal, non-business borrowers from high interest rates," and that "while the collateral in the present case may not exactly be the ordinary certificates of deposit in all respects and in a purely technical sense, any variance is not significant in view of the apparent purpose of the statute." The court of appeals affirmed the lower court's conclusion as to the purpose of the exception contained in the Illinois Usury Law and the application of that exception to the loan to the named plaintiff.

Both the district court and the court of appeals in the *Koos* case found that, because the plaintiff himself had no claim against the defendant, he was an inadequate representative of the class of borrowers who might have had such a claim. However, the district court added to its rationale by indicating that the plaintiff's claims would be atypical of those of the class even if they were only "possibly excepted" from the usury provisions of the Illinois law. The Seventh Circuit approved this rationale, stating: "Where it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." The court reasoned that this situation could result in "less attention to the issue which would be controlling for the rest of the class."

The court's opinion in *Koos* suggests that there are two methods
by which the adequacy of the plaintiff's representation of a class might be determined where defenses exist with respect to his claim which might not exist with respect to the claims of other class members. First, the courts could decide whether or not the plaintiff will prevail on the individual issue, as both the district court and court of appeals did in Koos. If the court determines that the plaintiff will not prevail on that issue, he cannot adequately represent the class. If the court determines that he will prevail on that issue, he will be an adequate representative of the class. The second approach would be to deny class action status where an issue has been raised with respect to the plaintiff which does not apply to most class members, especially where that issue could constitute "a major focus of the litigation."^82

The second approach is probably the most consistent with Eisen IV, since it does not require, as does the first approach, a determination of the merits of the representative party claim. Nor does it require a preliminary hearing with respect to the representative's claim which might otherwise be necessary to determine whether or not that representative is a member of the class and can adequately protect its interests.^83

Manageability

Perhaps the requirement which has been at issue in more class action cases than any other is the "manageability" requirement which applies in 23(b)(3) class actions.^84 This issue was discussed by the Seventh Circuit in some detail in Appleton Electric.^85 The court pointed out that the nature of the case (a suit for the refund of shipping charges) made it more manageable than many other cases, that the agreement of the plaintiffs to pay the cost of notice to the class avoided the question that was then pending before the Supreme Court in the Eisen IV case,^86 and that the district court had applied none of the

82. Id. at 1164.
84. One of the factors to be considered in determining whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy," is "the difficulties likely to be encountered in the management of a class action." Rule 23(b)(3)(D).
85. Appleton Electric v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974).
creative innovations such as the "mini-hearing," "selective notice" and "fluid recovery" which the district court had applied in the *Eisen* case.\(^{87}\) The court then added that the courts in the Seventh Circuit "have traditionally been tolerant of the manageability of multi-party litigation."\(^{88}\) In *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*,\(^{89}\) the court said: [t]he difficulties likely to be encountered in the management of a class action are not important when weighed against the benefits to the class, and any subclasses thereof, and to the administration of justice.” And in *Illinois v. Harper & Row Publishers, Inc.*,\(^{90}\) the court said: “Even though the class actions may expand administrative tasks, the benefits to be secured will more than outweigh the additional chores.”

In contrast to the liberal view taken by the Seventh Circuit toward class actions which present substantial problems of manageability, it seems that the courts in several other circuits are re-assessing the ability of the federal court system to cope with those problems. For example, in *Eisen v. Carlisle & Jacquelin (Eisen III)*\(^{91}\) the Court of Appeals for the Second Circuit concluded that the problem of vindicating the small claims of large numbers of class members was “for solution by the Congress” and could probably not even be remedied by further amendments to rule 23. In *Hackett v. General Host Corp.*,\(^{92}\) the Court of Appeals for the Third Circuit also emphasized the burden which complex class actions are imposing on the federal court system.

In support of its statement that the district courts in the Seventh Circuit “have traditionally been tolerant of the manageability of multi-

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87. 499 F.2d at 135-37.  
88. 494 F.2d at 138.  
91. 479 F.2d 1005, 1019 (2d Cir. 1973).  
party litigation,” the court of appeals in *Appleton Electric* quotes sweeping language from two decisions of the District Court for the Northern District of Illinois regarding the benefits of class actions outweighing the difficulties in their management.\(^9\) These quotes should not be construed to be a statement that the benefits of class actions will outweigh the problems raised in managing them in all cases. Rule 23(b)(3)(D) necessitates an inquiry into the manageability of the action and, although the court has indicated its intention to liberally apply the manageability requirement, that requirement cannot be ignored.

One aspect of manageability with which the court dealt in *Appleton Electric* was the difficulty in determining the identity of the members of the plaintiff class. The court pointed out that the reason for this difficulty was that some of the members of the defendant class destroyed the records needed to make rebates to their shippers. The court held that the defendants should not be permitted to use the destruction of those records to defeat the class action.\(^9\) There had been no justification for the destruction of records by the defendant class members and that those defendants had, in some cases, destroyed those records after receiving notice they would be required to make refunds to the plaintiff and members of the plaintiff class.\(^9\) Furthermore, the district court had, after holding a two-day hearing on the question, devised a reasonable procedure for ascertaining and modifying those class members.\(^9\) Thus, its conclusion in that case that the defendants’ destruction of documents should not be permitted to defeat the class was completely justified. But in many cases, the records needed to establish the identity of members of a class may have been destroyed through no fault of any party, and it may be difficult or impossible to reconstruct those records from other sources. In such


\(^9\) 494 F.2d at 139.

\(^9\) Id. at 139 n.24 and accompanying text.

\(^9\) The district court’s order required the members of the defendant class who had no records relating to the shippers who had shipped under the applicable tariffs during the time period covered by the plaintiff’s complaint to provide records of shippers who had shipped under those tariffs for the 18-month period closest to the applicable period. Although the court does not say so, it is probable that the district court contemplated giving notice to these shippers, many of whom were likely to have shipped under the same tariffs during the applicable time period. These shippers could then establish their right to recover by their own records and testimony, and thus avoid any “fluid class” recovery problems. See 494 F.2d at 137. See also Eisen v. Carlisle & Jacquelin (*Eisen III*), 494 F.2d 1005 (1973); and Bosches v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973).
a case, the court's inability to determine the membership of the class, or the persons to whom any recovery should be paid, may well necessitate the denial of class action status.\textsuperscript{97} The only alternative would be a fluid class recovery, which the Second Circuit held to be "illegal, inadmissible as a solution to the manageability problems of class actions and wholly improper" in \textit{Eisen III},\textsuperscript{98} and which the Seventh Circuit implied to be of at least questionable propriety in \textit{Appleton Electric}.\textsuperscript{99}

In \textit{Appleton Electric}, the court was presented with a case in which the defendant class members had made every conceivable effort to thwart the recovery by plaintiffs and their class of rate rebates to which they were rather clearly entitled. The carrier defendants had exhausted every avenue of review of the Interstate Commerce Commission's determination that the rates they charged were unfair and that the shippers whom they had overcharged should be reimbursed. The Commission's order was judicially reviewed by a federal district court and the shippers appealed that court's decision to the Supreme Court. Both the district court and the Supreme Court upheld the Commission's order. Even then, the carriers failed to pay the rebates which had been ordered. They were then sued in individual actions by many of the shippers. They resisted these actions, many of which had been pending for over three years. A number of the carriers destroyed their records identifying class members with no apparent justification after being put on notice that they would be required to rebate overcharges to them.\textsuperscript{100}

In view of the facts before it in the \textit{Appleton Electric} case, it is not surprising that the court dealt firmly with the members of the defendant class. But the court will certainly be faced with numerous difficulties in applying (or reconsidering) many of its unnecessarily broad statements of class action principles in the future.

\section*{Discovery}

One issue which has been frequently presented to the district courts, both in the Seventh Circuit and elsewhere, is whether parties

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{97} See, e.g., Turoff v. Union Oil Co. of California, 61 F.R.D. 51 (N.D. Ohio 1973).
\item \textsuperscript{98} Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973).
\item \textsuperscript{99} The court in \textit{Appleton Electric} noted that the district court had avoided certain "creative innovations" which the Second Circuit had found improper in \textit{Eisen III} (including fluid class recovery) and had "employed only procedures that are clearly proper in federal class action suits." 494 F.2d at 137.
\item \textsuperscript{100} Id. at 128-33.
\end{enumerate}
\end{footnotesize}
opposing class actions should be permitted to engage in discovery from absent class members and, if they are, what conditions and restrictions should be placed on that discovery. Several district courts have held that such discovery should not be permitted, but a number of other district courts have held that certain types of discovery against class members should be allowed, although usually subject to restrictions. However, this issue has been decided by no court of appeals other than the Seventh Circuit, which has decided three recent cases relating to the subject.

The cases which allow defendants to take discovery from class members (or require some affirmative response from class members) are:

101. See, e.g., Wainwright v. Kraftco Corp., 54 F.R.D. 532 (N.D. Ga. 1972); and Fischer v. Wolfinbarger, 55 F.R.D. 129 (W.D. Ky. 1971). See also, Bisgeier v. Fotomat Corp., 62 F.R.D. 118 (N.D. Ill. 1973) where the court refused to allow interrogatories to be sent to the class where it concluded that the information requested by them was irrelevant and that the interrogatories constituted "a tactic to take undue advantage of the class members or . . . a stratagem to reduce the number of claimants." The court cited Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971); and Gardner v. Awards Marketing Corp., 55 F.R.D. 460 (D. Utah 1972), in which the court held that the interrogatories which defendants sought to serve on class members were "unnecessary and unjustifiably dilatory," but stated that interrogatories could be served on class members "at an appropriate time and for essential purposes." Id. at 462.


103. One restriction which has been placed on discovery from class members is that the discovery must be reasonable, necessary, and not intended simply to take advantage of the class members or reduce the number of claimants. See, e.g., Bisgeier v. Fotomat Corp., 62 F.R.D. 118 (N.D. Ill. 1973). A number of courts which have allowed defendants to seek information from class members have refused to dismiss or bar the claims of those class members or apply other sanctions where the class members failed to comply with the requests for that information. See Arey v. Providence Hospital, 55 F.R.D. 62 (D.D.C. 1972) and Korn v. Franchard, 50 F.R.D. 57 (S.D.N.Y. 1970), rev'd on other grounds, 456 F.2d 1206 (2d Cir. 1972). See also unpublished order of Judge Hubert Will in Goodman v. ARi Inc., 73 C 3126 (N.D. Ill. November 11, 1974). But see Brennan v. Midwestern United Life Ins. Co., 59 F.R.D. 24 (S.D. Ia. 1972).

104. Clark v. Universal Builders, Inc., No. 72-1655 (7th Cir. July 20, 1974); Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); and Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971). Although the Tenth Circuit mentioned in Gerstle v. Continental Airlines, 466 F.2d 1374 (10th Cir. 1972) that the notice sent to class members pursuant to the order of the district court had required class members to inform the court of their intention to assert claims, that court did not specifically deal with the propriety of that notice. Similarly, in Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972), the Second Circuit discussed the effect of the proof of claim forms sent to class members pursuant to an order of the district court, but did not rule on the propriety of that order.
give several reasons for doing so. Most of the courts which have re-
quired class members to file either notices of their intent to assert
claims or some kind of pre-judgment proof of claim have emphasized
the desirability of defining the nature, scope and size of the class.\textsuperscript{105}
Others have found the information that could be obtained from the
class through interrogatories or statements of claim to be necessary or
helpful in re-assessing the size of the class, the adequacy of its rep-
resentation and the commonality of the issues before the court, as well
as other factors which would determine whether the case should be
permitted to continue as a class action.\textsuperscript{106} Some courts have concluded
that such information would provide them with the means to determine
whether subclasses should be either established or eliminated.\textsuperscript{107} At
least one court has suggested that interrogatories to the class might be
important in defining the scope of the defendants' potential liability in
cases where the parties desire to discuss settlement.\textsuperscript{108} Another court
pointed out that some response from class members who intended to
assert claims would "reduce the trouble and extent of subsequent no-
tices which may be required."\textsuperscript{109} Still other courts have indicated that
the information which could be obtained from class members was
necessary to either define the claims of the class members or permit
the defendant to develop its defenses to those claims.\textsuperscript{110}

\textsuperscript{105} Lamb v. United Security Life Co., 59 F.R.D. 24 (1972); Arey v. Providence
Hospital, 55 F.R.D. 71 (D.D.C. 1972); Korn v. Franchard, 50 F.R.D. 59 (S.D.N.Y.
1970), \textit{rev'd on other grounds}, 456 F.2d 1206 (2d Cir. 1972); and Philadelphia Electric

\textsuperscript{106} Arey v. Providence Hospital, 55 F.R.D. 71 (D.D.C. 1972); Korn v. Franchard,
50 F.R.D. 59 (S.D.N.Y. 1970), \textit{rev'd on other grounds}, 456 F.2d 1206 (2d Cir. 1972);

Hospital, 55 F.R.D. 71 (D.D.C. 1972); and Harris v. Jones, 41 F.R.D. 73 (D.
Utah 1966).

\textsuperscript{108} Bisgeier v. Fotomat Corp., 62 F.R.D. 118, 121 (N.D. Ill. 1973). \textit{See also}
stresses the importance of "allowing the parties to assess their claims prior to trial."


information regarding reliance and statute of limitations questions in securities fraud
case); Korn v. Franchard, 50 F.R.D. 59 (S.D.N.Y. 1970) (information relating to reli-
ance in securities fraud case); Minnesota v. United States Steel Corp., 44 F.R.D. 577
(D. Minn. 1968) (court in antitrust class action provides for proof of claim form
containing information regarding dates and amounts of purchases, defendant from
whom purchases were made, and use to which materials purchased were put); Har-
riss v. Jones, 41 F.R.D. 74 (D. Utah 1966) (class members in securities fraud case to
provide information regarding the representations on which they relied and the time they
first learned those representations were false). \textit{See also} Iowa v. Union Asphalt & Road-
oils, Inc., 281 F. Supp. 404 (S.D. Ia. 1968), in which the court found that a notice of
\textit{intent} to assert a claim was a matter of "expediency and fairness to the defendants,"
The cases which have denied defendants the right to seek discovery from class members usually emphasize that, to require class members to respond to such discovery requests, especially with the threat of their claims being dismissed or barred in the event they do not respond, is to require those class members to opt into the class, thus defeating the purpose of the opt-out provisions of revised rule 23(c)(2). As stated by Judge Tone:

The proposed procedure [of serving detailed interrogatories on class members] challenges the concept which is fundamental to the effective conduct of class actions under Rule 23(b)(3). The rule contemplates that the represented members of the class will benefit from, and be bound by, the judgment in the action "without the burden of actually participating."

The question of the right of defendants to take discovery from class members and the proper sanctions for the failure of class members to respond thereto was first presented to the Seventh Circuit in Brennan v. Midwestern United Life Ins. Co. In Brennan, the court reviewed the district court's dismissal with prejudice of class members who failed to respond to interrogatories to the class and requests to produce documents after they had received several notices that they were required to do so. The court there held:

It is likely that, at least in securities fraud cases alleging failure to disclose material facts, proof of reliance from class members will no longer be required. Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972); Bisgeier v. Fotomat Corp., 62 F.R.D. 118, 120-21 (N.D. Ill. 1973).

111. Rule 23(c)(2) (which applies only to class actions maintained under rule 23(b)(3)), provides that:

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.


113. 450 F.2d 999 (7th Cir. 1971).

114. The district court first directed that the orders requiring class members to answer interrogatories and produce documents be sent to class members. Accompanying these orders was a memorandum from plaintiff's counsel describing the discovery proceedings and the reason for the interrogatories and requests for documents, mentioning the deadline for responses thereto, and encouraging each class member to seek the advice of his own counsel or counsel for the named plaintiff. Thereafter, plaintiff's counsel sent a reminder to all class members reminding them of the deadline and again encouraging them to seek advice from their own or plaintiff's own counsel. After the deadline expired, plaintiff's counsel again wrote to class members who had not responded urging them to respond and informing them that their failure to do so would preclude them from sharing in any possible recovery. Finally, the unresponsive class members were
[A]bsent members of a class who receive notice of the pendency of the class suit may be subjected to the party discovery procedures permitted under the Federal Rules. Before ordering such discovery, a trial court must be assured that the requested information is actually needed in preparation for trial and that discovery devices are not used to take unfair advantage of 'absent' class members. Moreover adequate notice must be given so that such persons are fully informed of the discovery order and the possible consequences of their noncompliance with it.\textsuperscript{116}

Elsewhere in its opinion, the court indicated that a slightly different criterion than the "actually needed" test should be applied to determine whether party discovery should be permitted against class members. It stated that such discovery should be permitted where it "is necessary or helpful to the proper presentation and correct adjudication of the . . . suit."\textsuperscript{118}

The court next discussed the question of the propriety of discovery against class members in connection with a district court order requiring members of a defendant class to submit verified lists of the names and addresses of shippers who shipped under certain tariffs. In this case, \textit{Appleton Electric Co. v. Advance-United Expressways},\textsuperscript{117} the court simply remarked: [I]n view of the broad discovery of class members permitted in this circuit . . . it would indeed be anomalous to place restrictions on discovery in this refund case."\textsuperscript{118}

A few months after its decision in \textit{Appleton Electric}, the court again was faced with the question which was before it in \textit{Brennan}. In \textit{Clark v. Universal Builders, Inc.},\textsuperscript{119} Judge Will had given the class the notice required by rule 23(c)(2) informing class members that if they did not opt out of the class, they would be included in it. The case subsequently came before Judge Perry, who ordered that a second notice be sent to class members advising them that they would be excluded from the class unless they affirmatively requested inclusion. Judge Perry also dismissed with prejudice those class members who failed to answer interrogatories or appear for depositions.\textsuperscript{120}
The court in Clark first held that the second notice sent to class members was "confusing," an "unsound practice," and contrary to the express language of rule 23(c)(2)(B).\textsuperscript{121} It then held that the district court improperly dismissed class members who had failed to answer interrogatories because it had apparently done so without determining whether the Brennan criteria of necessity and the absence of a bad faith attempt to diminish class membership had been met.\textsuperscript{122} The court reached the same conclusion with respect to class members who failed to appear for depositions, except that it held that the burden on the party seeking deposition testimony to show the necessity of such testimony was even more severe than that imposed on the party seeking to use interrogatories.\textsuperscript{123}

In view of the restrictions on discovery against class members contained in Judge Swygert's opinions in Brennan and Clark, there seems to be some question as to the viability of Judge Sprecher's assertion in Appleton Electric that "broad discovery of class members [is] permitted in this circuit."\textsuperscript{124} However, it should be recognized that, despite the court's broad language in Appleton Electric, the discovery permitted there probably came within all of the restrictions set forth in Brennan and Clark. The discovery in Appleton Electric was obviously necessary to determine the names of the members of the plaintiff class, and the trial court reached the decision to require the members of the defendant class to provide the necessary information after holding two days of hearings on the class action issue during which it heard testimony from at least seventeen witnesses.\textsuperscript{125} Under the circumstances, it seems apparent that the plaintiff met its burden of showing that such discovery was necessary.

The Brennan, Appleton Electric and Clark decisions, as well as the district court decision in Bisgeier v. Fotomat Corporation\textsuperscript{126} justify several conclusions regarding discovery from class members. First, it is clear that "party" discovery from absent class members will be al-

\textsuperscript{121} Id. at 23.
\textsuperscript{122} Id. at 24. The court also specifically concluded that the information sought was not necessary. The court found that the information sought could not have been provided by most class members without technical or legal advice (and was, in fact, the subject of expert testimony at trial), and that the answers to some of the questions were already known to defendants. \textit{Id.}
\textsuperscript{123} Id. at 24-25.
\textsuperscript{124} Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126, 138 (7th Cir. 1974). Judge Sprecher was also on the panel which decided Clark.
\textsuperscript{125} Id. at 137-38.
\textsuperscript{126} 62 F.R.D. 118 (N.D. Ill. 1973).
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allowed in the Seventh Circuit under appropriate circumstances.127 This conclusion seems to be consistent with the subsequent decisions of the Supreme Court in Zahn v. International Paper Co.128 and American Pipe & Constr. Co. v. Utah129 in which that Court held that absent class members must be treated as parties for both jurisdictional purposes and tolling of applicable statutes of limitations during the time the class action determination is being made. Second, non-party discovery will also be permitted although under severely limited circumstances.130 Under the appropriate circumstances, the courts can impose sanctions for the failure of class members to comply with discovery orders.131 Third, it is clear that the district courts must give adequate notice to class members of discovery orders and the consequences of the failure of the class members to comply with them.132 Finally, it is apparent that the party seeking the discovery has the burden of proving that it is necessary and not intended merely to diminish the size of the class.133

The court has also set forth a number of criteria which can be applied in determining whether discovery is necessary, rather than a tactic to take undue advantage of the class. Brennan suggests that discovery will not be permitted "solely to determine the identity and amount of the class members claims."134 It also indicates that information relating to defenses which could not otherwise be established are valid subjects of inquiry.135 The decision in Clark suggests that the court will not approve interrogatories which require the assistance of

129. 94 S. Ct. 756 (1974).
131. See Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971).
132. Id. at 1006.
134. 450 F.2d at 1005. See also Bisgeier v. Fotomat Corp., 62 F.R.D. 118, 120 (N.D. Ill. 1973). But see id. at 121 where Judge Tone suggests that, "when the parties desire to discuss settlement . . . the aggregate amount claimed would be an important factor in the negotiations." Thus, interrogatories with respect to the number of class members and the amount of their claims might be proper at that time.
technical or legal experts, or which request information already known to the party opposing the class.\textsuperscript{136}

In the opinion of the authors, the Seventh Circuit has not only led the courts in other circuits in making law in the area of discovery against class members, but has done a commendable job of balancing the two almost completely inconsistent considerations involved. Certainly, rule 23 contemplates a role for class members which is less active than that of named parties, but it must be realized that there is often information which will be relevant to the claims or defenses of the party opposing the class which can best (and perhaps only) be obtained from class members. Rule 23 does not require that there be no individual issues in class actions, but only that common issues predominate over individual issues. To the extent that there are individual issues involved in a case, the party opposing the class probably has a due process right to present evidence relevant to them at trial, and that evidence may be unobtainable through any method other than discovery from class members.\textsuperscript{137} Furthermore, under certain circumstances, discovery from class members will be necessary to determine whether or not the prerequisites for a class action have been established.\textsuperscript{138} It may also be extremely beneficial for parties and the courts to know the dimensions of the cases in which they are involved to permit meaningful settlement negotiations and to provide some idea of how to manage the trial of the case (if it is manageable).\textsuperscript{139}

Although the Seventh Circuit has apparently recognized some of these considerations, they should not be underemphasized. The court must continue to keep in mind the constitutional and statutory rights which parties might have to disprove the claims of the members of the class they are opposing, to establish their defenses to those claims, and to develop the facts necessary for an intelligent decision on the question of whether the prerequisites of rule 23(a) and (b) have been satisfied. Although the court must also pay heed to the policies ordained by rule 23, those policies cannot be permitted to take precedence over the

\textsuperscript{136} Clark v. Universal Builders, Inc., No. 72-1655 (7th Cir. July 20, 1974).
\textsuperscript{137} For example, the authors do not know of any cases determining whether a class member can be compelled to testify at trial when he cannot be served within 100 miles of the court in which the action is to be tried. See Rule 45(3). In any event, even if the appearance of a class member could be compelled at trial, as can the appearance of any other party, it would be much less burdensome for his deposition to be taken.
\textsuperscript{138} See note 106 supra.
\textsuperscript{139} See note 150 supra; and Bisgeier v. Fotomat Corp., 62 F.R.D. 118, 121 (N.D. Ill. 1973).
right of parties opposing class actions to adequately prepare their defense.

**Appealability**

Another important issue which has recently been decided by the Court of Appeals for the Seventh Circuit is whether orders allowing or denying class action status are "final decisions" which can be reviewed by courts of appeals under 28 U.S.C. § 1291.140

Because of the importance of the issue of whether an action can proceed as a class action,141 litigants have often sought review by the courts of appeals when that issue is determined adversely to them. In so doing, they have asserted several different grounds for appellate jurisdiction. These include: the argument that, at least in cases where injunctive relief is sought, the denial of class action status constitutes an order refusing an injunction which is appealable under 28 U.S.C. § 1292(a)(1);142 the application for a writ of mandamus under the All Writs Act;143 the request for certification of the class actions ques-

140. 28 U.S.C. § 1291 (1970) provides in part:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts.

141. The importance of the question of whether an action will be permitted to proceed as a class action is demonstrated by the Eisen v. Carlisle & Jacquelin case which was recently before the Supreme Court. 94 S. Ct. 2140 (1974). The named plaintiff in that case claimed damages of only $70. Id. at 2144. However, he claimed to represent a class of six million persons. Id. at 2147. If each class member had the same amount of damages as the plaintiff, the defendants' potential liability to the class would be $420 million plus costs and attorneys' fees, as opposed to $70 to the plaintiff alone.

142. 28 U.S.C. § 1292 (1970) provides in part that:

> (a) The Courts of appeals shall have jurisdiction of appeals from:

    (1) Interlocutory orders of the district courts of the United States . . . refusing . . . injunctions.

Parties have been successful in obtaining review under § 1292(a)(1) of decisions denying class action status in the following cases: Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Otis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Shapiro v. Bernstein & Co., 386 F.2d 426 (2d Cir. 1967); Brunson v. Board of Trustee, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); see also Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972), and Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 Col. L. Rev. 1292 (1970). Contra, Songy v. Coastal Chemical Corp., 469 F.2d 709 (5th Cir. 1972).

tion under 28 U.S.C. § 1292(b);\textsuperscript{144} and the argument that an order allowing or denying class action status is a final decision under 28 U.S.C. § 1291.\textsuperscript{145}

Of all these methods for seeking review of adverse class action determinations, the method which has engendered the most controversy has been the argument that such a determination is a final decision within the meaning of 28 U.S.C. § 1291. This controversy has revolved around the question of whether a class action determination comes within the "collateral order doctrine" described by the Supreme Court in \textit{Cohen v. Beneficial Industrial Loan Corp.}\textsuperscript{146} In that case, the Court held that an order denying the application of a state statute which required a plaintiff to put up a bond for the defendant's costs and attorney's fees was appealable under section 1291. The Court held that the order denying the defendant's motion to require the plaintiff to post such a bond was

in that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute [section 1291] this practical rather than a technical construction.\textsuperscript{147}

The question of whether a class action determination is appealable under the \textit{Cohen} rule may well depend on whether that determination allows or denies class action status. Thus, the law which has developed in these two types of cases will be discussed separately.

\textsuperscript{144} 28 U.S.C. § 1292(b) (1970) provides in part:
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal.

\textit{See} Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). The Court of Appeals for the Seventh Circuit has suggested that this approach might be used on at least three different occasions in King v. Kansas City Southern Industries, Inc., 479 F.2d 1259, 1260 (7th Cir. 1973); in Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14, 15 n.5 (7th Cir. 1972); and in its unpublished orders in Garza v. Chicago Health Clubs, Inc., No. 73-1012 (7th Cir. May 18, 1973); Lupia v. Stella D'Oro Biscuit Co., Inc., No. 73-1026 (7th Cir. May 18, 1973), \textit{cert. denied}, 94 S. Ct. 2639 (1974); and Winokur v. Bell Savings and Loan Association, No. 72-2029 (7th Cir. May 18, 1973), \textit{cert. denied}, 94 S. Ct. 2639 (1974).

\textsuperscript{145} \textit{See} note 140 \textit{supra}.

\textsuperscript{146} 337 U.S. 541 (1949).

\textsuperscript{147} \textit{Id.} at 546 (citations omitted).
The question of whether an order denying a plaintiff the right to maintain his action as a class action was first presented to a court of appeals in the *Eisen I* case.\(^{148}\) In that case the Court of Appeals for the Second Circuit said:

> Dismissal of the class action in the present case, . . . will irreparably harm [the plaintiff] and all others similarly situated, for, as we have already noted, it will for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed.\(^{149}\)

The theory advocated in *Eisen I*, which became known as the "death knell" doctrine, has subsequently been adopted by the Courts of Appeals for the Fifth and Ninth Circuits,\(^{150}\) but has been rejected in both the Third and Seventh Circuits.\(^{151}\) When the question was presented to the Seventh Circuit in *King v. Kansas City Southern Industries, Inc.*,\(^{152}\) the court said: "We decline to adopt and accordingly reject the so-called 'death knell' theory originally enunciated in *Eisen v. Carlisle & Jacquelin* . . . . Likewise we do not find the 'collateral order' doctrine of *Cohen v. Beneficial Loan Corp.* . . . applicable to the type of order here involved."\(^{153}\)

Unfortunately, the court gave no explanation for its rejection of the "death knell" theory except that, in doing so, it was following *Hackett v. General Host Corp.*,\(^{154}\) *Gerstle v. Continental Airlines, Inc.*,\(^{155}\) and its "analogous decision in *Jumps v. Leverone*."\(^{156}\) But the Seventh Circuit was obviously not bound by the decision of either the Third Circuit in *Hackett* or the Tenth Circuit in *Gerstle*,\(^{157}\) and *Jumps*
hardly constitutes authority for the court's decision. *Jumps* predates the *Cohen* case, from which the "death knell" doctrine evolved, and contains no argument that the plaintiff's individual cause of action would, as a practical matter, be terminated by an adverse class determination. Rather, it holds that the plaintiffs in that case had no standing to appeal from an order limiting the class because that order did not affect their individual rights.\(^{168}\)

It is likely that the reasons for denying plaintiffs the right to appeal which most influenced the court in *King* are those which were described by the Third Circuit in *Hackett*. In that case, the court emphasized that the death knell theory had a discriminatory effect in that it would not permit appeals by defendants or by plaintiffs who had the economic ability (or who were personally interested enough) to prosecute a lawsuit on their own behalf.\(^{169}\) It also pointed out that there were other means for appeals from adverse class action determinations including 28 U.S.C. § 1292(a)(1)\(^{160}\) and 1292(b),\(^{161}\) and, "in isolated instances [where] arbitrariness creeps in, . . . the ultimate remedy of mandamus."\(^{162}\)

The considerations suggested by *Hackett* are certainly legitimate, but it is important for the court (and the district courts) to understand the full implications of a rule which does not permit an appeal as of right from an order denying class action status at the time that order is entered. If an appeal is not allowed until after an adjudication of the merits of the case, meaningful review may be impossible. For example, if the appeals court reverses the denial of class action status after an adjudication on the merits in favor of the plaintiff, it creates a "one-way intervention" situation where class members would "benefit from a favorable judgment without subjecting themselves to the bind-

the denial of the class action could not continue to prosecute the action on their own behalf.

\(^{158}\) 150 F.2d at 877-78. The plaintiffs, who were restaurant employees, sought to maintain their action on behalf of the defendants' employees working not only at the restaurant at which they were employed, but ten other restaurants as well. The court limited their class to the employees in the restaurant at which the plaintiffs worked. Even if the *Jumps* case were on point, it seems doubtful that the court would presently hold, under rule 23 as amended, that a party purporting to represent a class lacks standing to argue on appeal that the district court improperly dismissed the class allegations or limited the class.

\(^{159}\) *Hackett* v. General Host Corp., 455 F.2d 618, 621-22 (3rd Cir. 1972).

\(^{160}\) *Id.* at 622.

\(^{161}\) *Id.* at 623.

\(^{162}\) *Id.* at 624.
ing effect of an unfavorable one." Similarly, it would be somewhat anomalous in a case where the class was denied and plaintiff lost on the merits of his action and appealed both determinations, for the court of appeals to reverse the class action determination and affirm the determination on the merits. In such a case, class members would be invited to join in an action they already lost.

In light of these problems, it would behoove the district courts to heed the apparent invitation by the Court of Appeals for the Seventh Circuit to make liberal use of section 1292(b) with respect to orders denying class action status. Furthermore, despite the negative implications, the court of appeals may well have to issue writs of mandamus in cases where such problems are likely to arise and the district courts refuse to certify appeals under section 1292(b).

**Appeals From Orders Allowing Class Actions**

When the Seventh Circuit decided in *King* to reject the plaintiff's right to appeal from an order denying class action status, it first noted that it had previously denied the defendant the right to appeal in the converse situation where a class action had been allowed. The court said:

> In *Thill Securities Corp. v. New York Stock Exchange*, this court held that the denial of a motion to strike a class action was not an appealable order under 28 U.S.C. § 1291. We now hold that the present order is not appealable under § 1291, necessitating the dismissal of the appeal for lack of jurisdiction.\(^{164}\)

Actually, the question of whether an order allowing a class action was a final decision, and thus appealable under section 1291 was not even before the court in *Thill*. In that case the New York Stock Exchange appealed from an order denying referral of the case to the Securities and Exchange Commission under the primary jurisdiction doctrine, claiming that that order was a final decision under section 1291.\(^{165}\) As the court in *Thill* recognized, the exchange did not argue that the class action aspect of the district court’s order was appealable under section 1291 or the *Cohen* doctrine, but rather argued that, since the order allowing the class action was part of the order refusing to

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refer the case to the SEC, it was reviewable as a matter of "judicial economy." Nevertheless, the court elected to decide the question which had not been presented to it and to ignore the question of whether "judicial economy" justified the appeal. The court said: "Although the Exchange relied on 'judicial economy' to justify its argument for reviewing the issue of the propriety of the class action, we hold that the denial of the Exchange's motion to strike the class action is not an appealable order under 29 U.S.C. § 1291.")

The Court of Appeals for the Second Circuit has taken a position which is contrary to that taken by the Sixth and Seventh Circuits in Walsh and Thill. After holding that the plaintiff had the right to appeal from the denial of class action status in Eisen I, the Second Circuit in Eisen II remanded the case to the district court for an evidentiary hearing on the questions of notice, manageability and adequacy of representation. The district court held then that the case could be maintained as a class action. The defendants appealed from that decision. In Eisen III the Second Circuit stated its belief that "the consequences of class action rulings are so serious that these interlocutory orders should be made appealable." It also recognized the importance of affording "equality of treatment between plaintiffs and defendants." The court further noted that the Supreme Court in Cohen spoke of a "practical rather than . . . technical construction" of section 1291. Reviewing the requirements set forth in Cohen for the application of the collateral order doctrine, the court found that the order appealed from was clearly separable from the merits of the case. The difficult problem was whether the order allowing the class met Cohen's requirement that the order must "finally determine" the issue to which it applies. Rather than meeting this question head on, the court emphasized the "irreparable harm to a defendant

166. Id.
167. Id. at 17 (citations omitted). In Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969), the Court of Appeals for the Sixth Circuit held that an order allowing an action to proceed as a class action was not final because rule 23(c)(1) specifically provided that such an order could "be altered or amended before decision on the merits."
171. Id. at 1007 n.1.
172. Id., citing Korn v. Franchard Corp., 443 F.2d 1301, 1307 (2d Cir. 1971).
174. 479 F.2d at 1007 n.1.
175. 337 U.S. at 546.
in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23 and implied that, as a practical matter, this irreparable injury made the order allowing the class a final order.

When Eisen reached the Supreme Court, that Court said:

At the outset we must decide whether the Court of Appeals in Eisen III had jurisdiction to review the District Court's orders permitting the suit to proceed as a class action and allocating the cost of notice. Petitioner contends that it did not. Respondents counter by asserting two independent bases for appellate jurisdiction: first, that the orders in question constituted a 'final' decision within the meaning of 28 U.S.C. § 1291 and were therefore appealable as of right under that section; and second, that the Court of Appeals in Eisen II expressly retained jurisdiction pending further development of a factual record on remand and that consequently no new jurisdictional basis was required for the decision in Eisen III. Because we agree with the first ground asserted by respondents, we have no occasion to consider the second.

Despite the Court's general introductory language in Eisen IV, it seems clear that it did not really decide the question of the appealability of the order allowing the class action. In fact, the Court specifically found "the notice requirements of rule 23 to be dispositive of petitioner's attempt to maintain the class actions" and thus ruled that it had "no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction." About six weeks before the Supreme Court decided Eisen IV, the Second Circuit reaffirmed its Eisen III ruling in Herbst v. International Telephone and Telegraph Corporation. However, in so doing, the court did not even mention the collateral order doctrine of Cohen. Rather, it emphasized the time, effort and money spent, by both parties and the courts in dealing with such "gargantuan actions," and concluded that "judicial efficiency" required the appellate review of such actions.

176. 479 F.2d at 1007 n.1.
177. Id. Actually, the Supreme Court in Cohen seems to establish three criteria for the finality of a collateral order. First, the order must finally determine the issue. Second, the issue must indeed be collateral to the merits of the case, and third, the order must be "too important to be denied review." 337 U.S. at 546. The Second Circuit in Eisen III seems to equate the first of these to the last.
179. Id. at 2150 n.10.
180. 495 F.2d 1308 (2d Cir. 1974).
actions before such expenditures were incurred.\textsuperscript{181}

Despite the fact that the Second Circuit in \textit{Herbst} emphasized "judicial efficiency" as a ground for appeal, and did not discuss the \textit{Cohen} requirement of finality with which it struggled in \textit{Eisen III}, it made a point which could well support its conclusion that an order allowing a class action is a final decision within the meaning of section 1291. It said:

Candor compels us to add that as appellate judges we would be reluctant to hold that a class action had been improper after the district court and the parties had expended much time and resources although we might have had serious doubts if we had reviewed the question at the inception of the action.\textsuperscript{182}

As the court in \textit{Herbst} implies, the right to review an order allowing a class action after that action has already been tried, may be a right in theory only. For example, it would be extremely difficult for a court of appeals to justify reversing a district court's determination that an action was manageable as a class action after the district court spent months trying it as a class action. Thus, applying the "practical rather than... technical construction" of section 1291 demanded by the Supreme Court in \textit{Cohen},\textsuperscript{183} it may make sense to conclude, at least under some circumstances, that an order allowing a class action is a final decision appealable under section 1291.\textsuperscript{184}

Since \textit{Herbst}, the Second Circuit seems to have backed off of its liberal rule allowing appeals from orders approving class actions. In two cases decided since \textit{Herbst}, that court has refined and applied its criteria for allowing appeals from such orders and, in both cases, has refused to review the orders allowing the class actions. In \textit{Kohn v. Royall, Koegel & Wells},\textsuperscript{185} a case against a law firm alleging employment discrimination, the Second Circuit held that three issues are determinative of the question of whether orders allowing class actions are "final":

1. Whether the class action determination is 'fundamental to the further conduct of the case.'

\textsuperscript{181} \textit{Id.} at 1312-13. Although the Court accepted the appeal, it affirmed the district court's conclusion that the action could properly be maintained as a class action.

\textsuperscript{182} \textit{Id.} at 1313.

\textsuperscript{183} 377 U.S. at 546.

\textsuperscript{184} The same rationale would apply to the denial of class action status since the right to appeal from such an order may also be meaningless after a case has been tried and has proceeded to a judgment on the merits. See discussion following note 159 \textit{supra}.

\textsuperscript{185} 496 F.2d 1094 (2d Cir. 1974).
2. Whether review of that order is "separable from the merits."
3. Whether that order will cause "irreparable harm to the defendant in terms of time and money spent in defending a huge class action."\(^{186}\)

The Second Circuit's application of its three criteria in *Kohn* and a subsequent case, *General Motors Corp. v. City of New York*,\(^{187}\) indicate that the question of whether a class action determination is "fundamental to the further conduct of the case" will usually depend on whether it is likely that the plaintiff will continue the action alone if he is not permitted to pursue it as a class action. The court's opinions also indicate that whether review of the order allowing a class action is "separable from the merits" of the case will depend on whether a determination of the applicability of the prerequisites for a class action involves a determination of issues going to the merits of the case. The third criteria, relating to "irreparable harm to the defendant," involves a determination of the difference in the defendant's cost of defending the case if it is prosecuted on an individual basis rather than as a class action.\(^{188}\) The court in the *General Motors* case also rejected the defendant's argument that *Eisen IV* broadened the circumstances under which an appeal could be taken from an order allowing a class action, stating that it found in *Eisen IV* "a reaffirmation of the exceptional circumstances required to justify departure from the final judgment rule."\(^{189}\)

The decisions of the Second Circuit in *Kohn* and *General Motors* make one wonder whether that court, which seems to be inundated with appeals from class action determinations, does not now wish that it had taken the same approach as the Sixth and Seventh Circuits, which have left it up to the district courts to certify questions relating to class action determinations to the courts of appeals under section 1292(b). However, the approach adopted by the Sixth and Seventh Circuits raises the important question of whether meaningful review of a class action determination can ever be had if that review is not conducted at the time the determination is made. This question certainly seems entitled to more thorough consideration by the Court of Appeals for the Seventh Circuit than it was given in either *King* or *Thill*.

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186. Id. at 1098.
187. 501 F.2d 639, 644 (2d Cir. 1974).
188. Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1100 (2d Cir. 1974); General Motors Corp. v. City of New York, 501 F.2d 639, 645-46 (2d Cir. 1974).
189. 501 F.2d at 646.
CONCLUSION

Although class actions have been recognized by courts of equity for centuries, the courts have barely scratched the surface in developing the law with respect to most of the difficult conceptual and pragmatic problems raised by them. In recent years, class actions "have sprouted and multiplied like the leaves of the green bay tree," affording the federal courts the opportunity to deal with the rights of many small claimants whose claims might otherwise have never been heard. But with this opportunity comes the responsibility of developing the law in a way which is consistent with both the limited resources of the federal court system and the rights of the parties to adequately present their claims and defenses. Although the Court of Appeals for the Seventh Circuit has made a number of admirable contributions in this area, it has too frequently decided questions which were not before it and with respect to which it did not have the benefit of thorough argument. It has also manifested a tendency to make sweeping statements of policy—which it will find difficult to apply or discard in the future—when more limited conclusions would have been sufficient to deal with the issues before it.

The development of the law relating to class actions is of utmost importance to the administration of civil justice in the federal court system. The role which the federal courts should play in the class action area is uncertain and a subject of intense controversy. In the future, it is essential for the Court of Appeals for the Seventh Circuit to give the class action questions which come before it the most careful consideration possible on a case by case basis.